

JERSEY / JUDGMENT

AG -v- K [2016] JRC 158

(09 September 2016)

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JUDGMENT

THE commissioner: 1. In this case, the Attorney General invites the Court to impose a sentence for the two counts of indecent assault before us at a higher level than might have been expected were the Court to apply the existing Jersey sentencing levels for this type of offence. We were therefore addressed in some detail by both the Attorney General and Advocate Haines as to the correct approach and we are most grateful for their helpful submissions. 2. Having considered the position, the Court announced its decision on the day following the hearing and said that it would give its reasons in due course. What follows constitutes those

reasons.

The facts 3. Any sentence must reflect the facts of the particular case and accordingly we begin by summarising the facts. This is largely taken from the Crown's summary. 4. The defendant is 36. He is the victim's stepfather, being married to the victim's mother. At the time of their marriage, the victim was living with her grandmother in another country. However, when she was 6 or 7, she came to live with her mother and the defendant in Jersey. They lived in a one bedroomed apartment with a living room, small kitchen and a bathroom. The defendant and the victim's mother slept in the bedroom and the victim slept on a sofa bed in the living room. 5. In October 2008, when she was 10, the victim disclosed to her headmaster that she had been kicked by the defendant that morning. Investigations followed and in due course, on 10 th December, 2008, the defendant pleaded guilty before the Magistrate's Court to three charges of child cruelty contrary to Article 35 of the Children (Jersey) Law in respect of the victim as follows:- (i) On one occasion, the defendant pushed the victim onto her bed. He then held her down by holding her arms above her head. She wriggled to get free and shouted 'stop' . The defendant then punched her in the stomach. This made her vomit twice. The victim stated that he then grabbed her by the hair and struck her again. In interview, the defendant admitted holding the victim down and punching her, but could not remember dragging her by the hair, saying he thought that he had dragged her by her hand, and claimed he could not remember what happened after that. (ii) In relation to the second charge, the victim was on another occasion vacuuming when the defendant grabbed her by the waist and pushed her against the wall. He put his right hand round her throat and squeezed. The victim reported that the room began to spin. The defendant let go

of her, and she fell to the floor. The victim added that she could not stand up, so the defendant picked her up. He then apologised. In interview, the defendant admitted holding the victim by the throat and remembered that she had fallen to the floor and that he had helped her up. He did not remember the surrounding circumstances. (iii) On 17 th October, 2008, (the day of the victim's initial disclosure), the defendant, who was running late for work, kicked the victim to the upper leg or buttock. He was wearing steel toe-capped boots and admitted that he knew he had hurt her, as she cried. The victim told the interviewing officers that the defendant had told her it was her own fault as she had made the defendant and her mother cross. The victim did not know what she had done wrong. 6. In addition to the incidents that led to the criminal charges, the defendant admitted to having regularly hit the victim, though he described these as gentle slaps. The defendant was placed on probation for two years and ordered to undertake 150 hours' community service. 7. Since the conviction in 2008, the defendant and the mother have had three children together. The defendant, the mother, the victim and the three children continued to live together. In 2014, the victim started going out with a boyfriend. She told him that the defendant had been violent towards her and in November 2014 told him that she had been sexually as well as physically abused by the defendant. 8. The boyfriend witnessed the defendant being verbally abusive towards the victim on a few occasions, shouting at her "stupid idiot", telling her "you don't do anything right", and on one occasion telling her "he (the boyfriend) will leave you, you don't do anything right; you dress like a whore". 9. The boyfriend's mother also witnessed the tension in the relationship between the defendant and the victim, and noticed that the defendant seemed to treat the victim as if she was not part of the family. 10. On 12 th January, 2015, an incident took place when the boyfriend, who had dropped the victim home, thought that the defendant was behaving aggressively towards the victim. He took the victim back to his mother's car and told his mother to drive directly to the police station. 11. At the police station, the victim made a complaint that she was being abused and treated like a 'skivvy' by her stepfather but did not make an allegation of sexual abuse at that stage. Following the incident, she left home and went to live with the boyfriend and his mother. Eventually in March 2015, she made a complaint to the police of sexual abuse by the defendant. This had taken place prior to the complaint of physical abuse in 2008 but she said she had been scared of what the defendant would do if the police knew about the sexual abuse and had not mentioned it at the time of the investigation in 2008. 12. By way of background, the victim reiterated her complaint in 2008, namely that between the ages of 7 and 10, the defendant used to punch her in the stomach to relieve his own stress. He would burst into the sitting room where she slept, remove the bed covers, lift her arms above her head and proceed to punch her. She stated she used to get really frightened. She told the police, however, that in addition to the physical abuse, the defendant had done something to her that "made her get really frightened, scared..... cry tears". She initially described his actions by saying "he used to do what actually a wife would do to their husbands. Oral, like he used to put his penis in my mouth". 13. The indictment contained a number of counts but the Crown accepted the defendant's plea of guilty to two counts of indecent assault, namely Count 1 and Count 5 and elected not to proceed on the other counts. The facts of Count 1 as outlined by the Crown were as follows. On an occasion when the victim was 7, the defendant knocked on the wall between the bedroom and the sitting room. He entered the sitting room where the victim was asleep in bed

dressed in her pyjamas. He pulled the bed covers off and pulled her by the arm out of bed and into his bedroom. He then asked her to kneel down. He took a piece of clothing from out of the chest of drawers and wrapped it around her head over her eyes so that she could not see anything. He then tied her to the sink in his bedroom by pulling her hands behind her back around the pedestal of the sink and then tying them together with an item of her mother's clothing. She was therefore bound to the sink with her hands behind her back and was on her knees. 14. The defendant then took off his boxer shorts, put his penis in her mouth and thrust it backwards and forwards repeatedly. He grabbed her hair and pulled her head backwards and forwards. She tried to be sick but he would not stop and just continued. The defendant then ejaculated into her mouth. He instructed her not to swallow any of his semen but to spit it out into the sink. He untied her hands so that she was able to stand up and spit out the semen but he told her not to take off her blindfold until he had left and gone to the bathroom. 15. On the second occasion (Count 5), he again knocked on the wall, so she knew what she was meant to do. She went into his bedroom, got clothing out of the drawer herself and gave it to him. He blindfolded her and tied her to the sink as previously after she had knelt down. As she put it, she "let him do the rest" in order to avoid being "hurt badly". This second incident followed the same pattern as the first. He put his penis into her mouth and thrust it backwards and forwards. He continued until he ejaculated and then again told her not to swallow. She said that on each occasion she went back to bed and just lay there crying. After the incidents, the defendant would take a shower and the victim would return to her bed. She was 7 years old on the first occasion and 9 years old on the second. Each time she cried but this did not stop the defendant abusing her. 16. When interviewed following his arrest, the defendant emphatically denied the allegations. He could not explain why she was making these allegations against him. In due course, despite his initial denials, he pleaded guilty to the two counts referred to above on an agreed basis as we have just described. 17. The Court has received a personal statement from the victim (who is now 18) and a psychological report on her prepared by Dr Carritt-Baker. Although this judgment will be published in anonymised form, we think it undesirable to describe the effect on the victim in any degree of detail in order to protect her privacy. Suffice it to say that the symptoms she suffers from include flashbacks, sleep disturbance, dissociation and avoidance behaviours. She has regular nightmares of a figure of someone dressed like the defendant and this person sometimes tries to hurt her. Dr Carritt-Baker expresses the view that the range of symptoms which she suffers are consistent with her having Post-Traumatic Stress Disorder. The Court is of the opinion that the effect of the defendant's violation of the victim has been very considerable. 18. It is a sad fact that an additional trauma suffered by the victim is that, since she disclosed the sexual abuse, her mother has refused to have anything to do with her and has, in effect, taken the part of the defendant. As a result, she sees little of her siblings as well as not seeing her mother. Other Cases 19. Before turning to consider the submissions, we propose to summarise briefly the facts of various other cases to which we were referred as both the Attorney General and Advocate Haines sought to place reliance on them, albeit for different reasons. 20. In J v AG

[2016] JCA 090 , a number of sexual offences were committed against the female victim who was aged between 13 and 14 at the time; J was aged between 23 and 24. He was in a relationship with the victim's mother and was therefore in a position of trust. The offences took place over a period of some eight months. There were eight counts. Count 1 involved indecent assault by licking and digitally penetrating her vagina. Count 2A was unlawful sexual intercourse which involved the insertion only of the tip of his penis into the victim's vagina for a few seconds with J desisting when she asked him to stop. Count 4 involved procuring an act of gross indecency in that the victim masturbated him and performed oral sex on him. He had been at home with friends in a downstairs room and had sent the victim a message on her phone instructing her to meet him in the upstairs bathroom where the offence took place. Count 5 was another count of procuring the commission of an act of gross indecency when she masturbated him. Count 6 was indecent assault by touching her naked breasts on the same occasion as the masturbation. Count 7 was indecent assault by licking her vagina, and Count 8 was another offence of procuring her to masturbate him. 21. The Royal Court imposed total sentences (some concurrent and some consecutive) of 6 years imprisonment. 22. On appeal, the Court of Appeal reduced the overall sentence to one of 4½ imprisonment. As we read the judgment, the appeal was allowed essentially on two grounds. The first was that the Royal Court had failed to explain its reasoning and furthermore appeared to have misunderstood the factual position, e.g. it referred to physical coercion when there had been a specific agreed factual basis that the victim had been a willing participant. Secondly, the Court of Appeal felt that a sentence of 6 years could not be justified when compared with the facts in the cases of AG v DS

[2009] JRC 213 , AG v G

[2009] JRC 148 , AG v U

[2011] JLR 812 and AG v T

[2016] JRC 001 . The Court acknowledged at paragraph 37 that, as stated by Collas JA in X v AG

[2014] (2) JLR 384 at 85, every case had to be decided on its own facts and comparisons with other sentencing decisions needed to be treated with caution, but said that it was also important that there should be reasonable consistency in sentencing in the interests of justice and to maintain public confidence. The Court of Appeal, particularly in the absence of adequate reasoning from the Royal Court, was unable to reconcile the level of sentence passed on J with the sentences passed in those other cases. It concluded that the correct starting point for Count 4 (procuring of oral sex) was 4½ years, with the consequence that after deduction for mitigation a sentence of 2 years and 1 month was appropriate. 23. In AG v U the defendant was convicted after a trial of twelve counts of indecent assault and procuring acts of gross indecency with a boy over a four year period, although the boy's age is not given in the judgment. The acts involved sucking the child's penis, touching it, placing the defendant's own penis between the child's buttocks, and placing a finger in the child's anus. The offences of procuring acts of gross indecency involved inducing the child

to suck the defendant's penis. The Court said at paragraph 3:- "The introduction of young people to oral sex has always been regarded by this Court as placing counts of gross indecency or procuring acts of gross indecency at the higher level of the offence for the purposes of sentencing." 24. Aggravating factors included a breach of trust and the fact that the victim was aware the defendant had filmed the offences. The Court passed concurrent sentences totalling 5 years together with a consecutive sentence of 2 years for unrelated offences of making indecent photographs of children by downloading images from the internet. 25. AG v G involved indecent assault upon G's daughter (aged 14) and her friend (aged 15) and procuring acts of gross indecency to be committed upon him. The indecent assaults consisted of oral sex on the child, digital penetration and simulated sexual intercourse by rubbing his penis in her vaginal area. The procuring of gross indecency involved procuring the child to masturbate him. It was not therefore a case of procuring oral sex to be carried out on him by the child. The defendant pleaded guilty and was sentenced to a total of 4 years' imprisonment with concurrent sentences being imposed. 26. In AG -v- DS the abuse took place over a 14 month period on a girl who was 13 and then 14, when DS was about 44. The indecent assaults began by touching buttocks and breasts over clothing, but escalated to touching her breast and vagina under her clothing but without digital penetration. The gross indecency involved asking the child to perform oral sex on him when she was 14, and this happened on a number of occasions. The defendant was sentenced to concurrent sentences totalling 4 years. 27. AG v T had more similarities with the present case than those we have just referred to. The defendant pleaded guilty to two counts of indecent assault on a female child aged 10. The defendant was the partner of a woman who looked after the complainant while the complainant's mother was at work. In relation to the first count, the defendant took the complainant to a building site and went inside a property on the site. He grabbed the complainant by the neck and pulled her up from the floor. He squeezed her cheeks very hard forcing her jaw open in order for him to insert his penis into her mouth. She said that his penis touched her lips and it went into her mouth a little but did not go beyond her teeth. The defendant ejaculated and some semen went on the complainant's lips with the rest going on the floor. The complainant also disclosed that the defendant had indecently assaulted her in the same manner at his bedsit when she was 8. 28. The Court in T referred to the fact that previous authorities had indicated that the Court took a particularly condign view of the introduction of oral sex and also referred to the fact that, under Section 1 (1) of the Sexual Offences Act 2003 of England and Wales, rape had been redefined so as to include penetration of the mouth by a man's penis without consent. The Court then said this at paragraph 10:- "Whilst that statutory change of definition has not occurred in Jersey, the Court considers that assaults of this kind, namely when a penis is forced into a bodily orifice of a vulnerable and clearly unwilling complainant, using force and threats, should be regarded (and would be regarded by right thinking members of society today) as being in the same category of seriousness as rapes involving vaginal penetration. It seems to this Court that penetration of the mouth constitutes an intensely intimate and degrading act, which can involve a severe degree of emotional and psychological trauma." 29. The Court

accordingly went on to say that the particular offence before it should be regarded as being in a similarly serious category for sentencing purposes as rape, and therefore had regard to the Court's sentencing policy in cases of rape. It recalled that, in rape cases, the Royal Court applied the guidelines laid down in the leading English case of *R v Milberry*

[2003] 1 Cr App R 25 and this approach had been endorsed by the Court of Appeal in *Da Graca v AG*

[2006] JLR N8;

[2006] JCA 038 . Applying the *Milberry* approach, the Court took starting points of 8½ years for Count 1 and 9½ years for Count 2, leading to sentences of 5 years for Count 1 and 6 years for Count 2 concurrent, making a total of 6 years' imprisonment. The submissions in outline 30. The Attorney General submits that sentences for certain contact sexual offences in Jersey have fallen behind the levels of sentence for such offences in England and Wales where, as a result of guidelines issued by the Sentencing Council, sentences for such offences have increased. He submits that there is no valid reason for offences of this nature to be regarded less seriously in Jersey than they are in England and Wales. He therefore invites the Court to sentence with the English guidelines firmly in mind. Taking account of the English guidelines applicable to the case of the rape of a girl under thirteen, he submits that, after allowance of one third for his guilty plea, the defendant should be sentenced to a total of 12 years imprisonment. 31. Advocate Haines, on the other hand, submits that it is not open to the Court to proceed in this manner. The decision of the Court of Appeal in *J* is authoritative and a sentence of 12 years cannot be justified by reference to the sentencing levels applied in that case and in the other cases we have referred to. Furthermore, it is not open to the Court to treat the present offences as if they were offences of rape, as the definition of rape has not been amended in Jersey as it has in England and Wales. Applying the sentencing levels approved in *J* and acknowledging that the case was more serious than *J* , he submitted that the correct sentence would be in the region of 5 to 6 years. Discussion 32. It seems to us that the various issues raised by the Attorney General and Advocate Haines may be summarised under the following headings. (i) Is *J* a binding authority? 33. Advocate Haines submits that we must follow the sentencing level approved in *J* . Whilst he acknowledged that the facts of the present case were more serious, he contended that, if 4½ years (including 2 years 1 month for the offence involving the procuring of fellatio by the victim) was the appropriate level of sentence in *J* , a sentence of more than 5 to 6 years could not be justified in this case. 34. We do not accept that submission. *J* was not a guideline case where the Court of Appeal established authoritative and clear guidelines for sentencing in certain types of offence (contrast for example the case of *Rimmer v AG*

[2001] JLR 373 in the field of trafficking in class A drugs). All that happened in *J* was that the Court of Appeal felt that the sentence imposed by the Royal Court was too high when compared with the facts of specific other cases to which its attention was drawn, and the Royal Court had failed to explain why it felt that a sentence of 6 years was appropriate

when compared with those other cases. In those circumstances, all the Court of Appeal did was to pass a sentence which it felt bore comparison with those cases. It was simply a decision on the facts of the particular case. It did not purport to lay down any general guidelines. 35. Whilst of course courts should strive to be as consistent as possible in sentencing, they have regularly warned against the dangers of sentencing by trying to compare the facts of one case too closely with another. Thus in *Wood v AG*

[1994] JLR Notes 15a and 1994/032 in the Court of Appeal, Le Quesne J A said this:- "It is necessary to refer to earlier cases when dealing with appeals against sentence in order to ensure, as far as possible, that the right degree of consistency is achieved between one case and another. Indeed, it is for this purpose that both this court and the Royal Court have, on occasion, when passing sentence, not only dealt with the particular offender before them, but have also laid down guidelines to be followed in subsequent cases. It is necessary and important, however, to remember that reference to earlier cases is made in order to see the principles and guidelines which have been laid down there and to follow them. The purpose of referring to earlier cases is not to analyse the exact sentence which was then passed and the precise reasons why the court arrived at it. This would be an impossible undertaking since sentencing is a discretionary exercise in every case and the reports do not include every feature which influenced the court in exercising its discretion on earlier occasions. We notice a tendency, particularly in appeals against sentence in drug-related cases, to try to calculate the exact effect given by the court in earlier cases to each factor and then to say that those effects must be reproduced in the case at hand. This is a misleading exercise since, as I have said, it is impossible from the reports to discover every consideration which influenced the court. It is also an exercise which, if it could be achieved, would be inconsistent with the discretionary nature of the sentencing function. That discretion, like all discretions, has to be exercised on proper grounds and with due regard to relevant principles, but the important fact remains that in deciding upon the sentence of every case, the court is exercising its discretion upon the facts of that case." 36. The Court of Appeal (per Nutting J A) specifically endorsed these observations in *Dykes v AG*

[1999] JLR 146 at 153 when saying as follows:- "Those remarks are as pertinent to cases involving indecent assaults as they are to the offence of supplying a class A drug..... This reminder to us of the importance of those principles would deter us making any exhaustive comparison between the facts and sentences in the cases to which we have referred and the instant case, and we do not therefore propose to lengthen this judgment with such an analysis." 37. We are not suggesting that the Court of Appeal in *J* stepped outside this approach. On the contrary, the difficulty for the Court of Appeal in *J* was that the Royal Court had not explained its reasoning for imposing a sentence which, on its face, appeared to be out of kilter with the other cases to which the Court of Appeal was referred. But we are quite satisfied that *J* is not intended to be a guideline case. Furthermore, the facts of the case were completely different from those with which we are faced. *J* concerned a girl who was at least 13, the basis of plea was expressly that she had been a willing participant

in what occurred and there had been no ejaculation. That bears no comparison with the facts of the present case where a 7 (and later 9) year old girl was tied up, blindfolded and then forced to perform oral sex on the defendant to the point of ejaculation. For all these reasons, we consider that J is not a binding authority and the sentences imposed in that case do not assist in determining the correct sentencing level for the current offences. (ii) Is it proper to apply rape sentencing guidelines to the present offences? 38. As already stated, this Court held in T that it was proper to do so in relation to the particular offences of indecent assault which were before it. The Court also appears by implication to have adopted this approach in the case of AG v Jalam

[2015] JRC 169 , although this is not specifically stated in the judgment of the Deputy Bailiff. That case involved an indecent assault on a woman aged 22. Although some consensual sexual activity had taken place between her and the defendant earlier on in the evening, she made it clear that she did not want the matter to go any further. The defendant then took her into a small private car park and blocked her escape. He demanded that she perform oral sex on him and she refused. He hit her four times to the head in rapid succession and she fell to the ground. He then forced his penis into her mouth and repeatedly forced her to perform oral sex on him. The Crown relied on the Milberry guidelines for rape sentencing on the basis that the facts of the offence should be regarded as being in a similarly serious category for sentencing purposes as rape. It took a starting point of 6 years with recommendation for a sentence of 4½ years after deduction for the guilty plea and mitigation. The Royal Court granted the conclusions. It did not deal specifically with whether it regarded rape sentencing levels as helpful, but said at paragraph 4 of its judgment that it considered that the Crown was correct in its approach in the light of all the circumstances. We read that as agreeing with the proposition that the sentencing guidelines for rape were applicable to the facts of that case. 39. Advocate Haines submitted that the Court was wrong in T and Jalam to proceed in this manner. The defendant in this case had not been convicted of or pleaded guilty to the offence of rape; he had pleaded guilty to indecent assault. The fact that the facts of the offence would constitute rape in England and Wales did not mean that this Court could pass sentence as if it were a rape in this jurisdiction. 40. In our judgment, that submission misunderstands what the Court actually said in T and (by implication) in Jalam . We accept entirely that the defendants in T and Jalam did not stand convicted of rape; they were therefore to be sentenced for the offences of indecent assault to which they had pleaded guilty. However, what the Court said in T was that the facts of those particular indecent assaults were, in the Court's opinion, just as serious as rape involving vaginal penetration and that therefore the level of sentence should be similar to that which it would be for rape. 41. This Court entirely agrees with that approach. We cannot improve on the language used by Commissioner Clyde-Smith at paragraph 10 in T , which we have already set out at paragraph 28 above. To force a penis into the mouth of a clearly unwilling complainant, using force and threats, should be regarded (and would be regarded by right thinking members of society today) as being in the same category of seriousness as a rape involving vaginal penetration.

Penetration of the mouth constitutes an intensely intimate and degrading act which can involve a severe degree of emotional and psychological trauma. That is the firm view of the members of this Court which includes three Jurats beyond those who sat in T (so that a total of nine Jurats have so far expressed that view). 42. The Court in T was careful to confine its observation to the type of indecent assault which was before it and with which we are also concerned, i.e. the use of force or threats to force a penis into the mouth of an unwilling victim. Neither in T nor in this case is it being asserted that all cases of fellatio (charged as procuring an act of gross indecency when the facts do not disclose an assault) should be treated as being as serious as rape. Advocate Haines submitted that it was significant that in J the Court of Appeal did not apply the guidelines for offences of rape despite having T drawn to its attention. We do not agree. In J, the complainant was a thirteen year old girl and willing participant and there can therefore be no comparison in such a case with the sentencing guidelines for rape. It is therefore not surprising that the Court of Appeal did not allude to rape sentencing guidelines. 43. It follows that we consider the sentencing levels for offences of rape to be relevant and helpful in determining the correct sentence for the offences before us. (iii) Application of the Milberry guidelines 44. It is well established that this Court applies the guidelines described in the English case of Milberry (*supra*) when sentencing for offences of rape. That case lays down various starting points after a contested trial. The starting point may be increased from 5 years to 8 years where any of seven aggravating features are present (listed in paragraph 20 of the judgment in Milberry). Two of them are present in this case, namely that the victim is a child and that the offender was in a position of responsibility towards the victim, i.e. was her stepfather. The presence of any one of the aggravating features attracts the higher starting point of 8 years and clearly when two of them are present it may increase the starting point beyond that figure. We take the fact that the victim is a child as sufficient to move the starting point to 8 years and we take the breach of trust into account as a further aggravating feature below. As the Court of Appeal said in *Da Graca v AG* at paragraph 3 of the judgment: "The relevant starting point must then be reviewed against the whole range of relevant mitigating factors and other aggravating factors, and increased or reduced accordingly to produce the final sentence. This two-stage process can seem unduly mechanical. However, it needs to be borne in mind, as all the cases have emphasised, that these are only guidelines. Cases of rape are infinitely varied. Each one is unique. The sentencer is called upon to make a judgment about the cumulative effect of all the circumstances of the offence. Where there are major aggravating factors present, it may make little difference whether they are treated as increasing the starting point or the amount which is added to the starting point." 45. We consider that the following aggravating features (apart from the victim being a child) are present in this case:- (i) An especially serious effect on the victim, as we have described above. (ii) Further degradation of the victim; she was on her knees and the defendant tied her up with her hands behind her and secured to the sink. She was blindfolded. It must have been a terrifying and humiliating position for her to be placed in. He then ejaculated in her mouth and kept her blindfolded as he instructed her to spit the semen into the sink.

She was not allowed to remove her blindfold until he had left the room. (iii) Breach of trust; the defendant was her stepfather and was in a position of trust and responsibility towards her. (iv) The location and timing of the offences; they took place when the victim was woken from sleep in her bed, a time and place when she should feel safe and secure. 46. In our judgment, putting these factors together, the starting point would move up from 8 years to 12 years. As to mitigation, we do not think there is anything significant other than the plea of guilty. We endorse the observation of the Court in T at paragraph 26 that:- "In a case as serious as this the personal circumstances of the offender have to take second place behind the plain duty of the Court to protect victims of sexual attacks (see Wellman

(1999) Crim LR 343 and 'L'

(1999) Cr at R 117)." 47. Accordingly, had we been applying the Milberry guidelines, we would have sentenced the defendant to a total of 8 years' imprisonment after deducting one third for the guilty plea. In view of the sentence which we have actually determined upon, we do not need to digress to consider any differentiation in the sentence on the two counts. 48. We are of course aware that this is a sentence which is 2 years longer than that imposed in T . The Court regards the facts of these offences, with the tying up and blindfolding of a 7 (and 9) year old girl and the full ejaculation in her mouth, as being more serious than in T but, to the extent that it may be argued that 2 years is more than is necessary to reflect the difference between the two cases, this Court considers that the sentence imposed in T was on the light side. (iv) The current approach to rape sentencing in England and Wales 49. The position in England and Wales is now governed by guidelines issued by the Sentencing Council in relation to sexual offences ("the Guidelines"). Judges in England are obliged by statute to follow any relevant guidelines issued by the Sentencing Council unless they consider that, in a particular case, it would be contrary to the interests of justice to do so. The Guidelines are applicable to all offenders sentenced on or after 1 st April, 2014, regardless of when the offences took place. 50. The Guidelines provide a structured decision making process with the judge having to follow a number of steps. The first is to determine the offence category following an assessment of the harm caused by the offence and the culpability of the offender having regard to specific listed factors. Once the offence category is ascertained in this manner, the relevant starting point is identified by the Guidelines, but this is then adjusted upwards or downwards to take account of aggravating and mitigating features so as to reach a sentence within the range provided in the Guidelines. There is then an appropriate reduction for the guilty plea and the judge must finally consider the principle of totality where an offender is to be sentenced for more than one offence. 51. For offences of rape generally, the broad approach established in Milberry appears to be approved but with some changes. For example, in the case of a single count of rape of an adult where the offence falls within category 2A (because of the presence of any of the listed features in relation to harm and culpability), the starting point is 10 years rather than the 8 years suggested in Milberry . 52. The Guidelines have a special section dealing with rape of a child under thirteen. Both the prosecution and the defence in this case have consulted

English counsel experienced in the practice of criminal law and sought their advice as to the likely sentence which would be imposed by an English judge on the facts of the present case having regard to the Guidelines. Both counsel agreed that, by reference to the features of harm and culpability listed in the Guidelines, the offences fall within category 2A of the Guidelines. This gives a starting point of 13 years which can then be adjusted by reference to aggravating and mitigating factors. Taking these into account, counsel instructed by the Attorney General considers that a starting point of 14 years for each offence would be adopted, whereas counsel instructed for the defence considers that 13½ years would be taken. Counsel for the Attorney General considers that the judge would feel it necessary to impose a consecutive sentence to mark the fact there was a second equally serious assault on this child. He would do this by making sentences consecutive but reducing the sentence on each count. The upshot would be, said counsel, to take an overall starting point of 18 years (10 years on Count 1 and 8 years on Count 5). Assuming a full one-third discount, this would give a sentence of 12 years' imprisonment, made up of two lesser consecutive sentences. Counsel for the defence simply takes a one-third discount from 13½ years and considers that a judge would impose an overall sentence of 9 years. This difference of opinion of course goes to show that, even with the existence of the Guidelines, sentencing remains an art rather than a science and that there is room for differences of view as to the application of the Guidelines to the facts of a particular case.

53. Nevertheless, it is clear that, even on the defence case, the sentence imposed in England and Wales would be higher than that which this Court feels would be imposed by application of the Milberry guidelines; and if the views of counsel for the Attorney General are correct, the difference would be quite marked. In other words, it is clear that sentencing levels for an offence of the nature before us have increased in England and Wales as compared with the level established by Milberry . (iv) Can and should this Court adjust sentencing levels for offences of this nature having regard to current sentencing levels in England and Wales? 54. Advocate Haines very properly reminded us of the many cases in which the courts of this island have explained that Jersey is a separate jurisdiction and does not have to follow the sentencing principles and levels established by the courts of England and Wales. We think the position is conveniently summarised in the judgment of the seven judge Guernsey Court of Appeal in *Wicks v Law Officers* [2011-2] GLR 482. That Court was constituted with seven judges because of concern about observations of the Guernsey Court of Appeal in the earlier case of *Gunter v Law Officers* [2011-2] GLR 147, which seemed to indicate that Guernsey was obliged to follow the sentencing levels established in England and Wales in certain cases. The Court in *Wicks* emphatically disagreed with that proposition and reaffirmed the independence of Guernsey in sentencing matters as follows at paragraphs 17-18:- "17. The difficulty with the observation in *Gunter*.... is that it appears to suggest that, when the elements of the offence in question and the statutory maximum sentences are the same in Guernsey as in England and Wales, the Guernsey courts may only depart from English sentencing levels if there is a significant difference in social or other conditions between Guernsey on the one hand and England and Wales on the other. We must respectfully disagree. Such an approach is

wholly inconsistent with Guernsey's position as a separate jurisdiction. Naturally, where the elements of the offence in question are comparable in the two jurisdictions and the statutory maximum sentence for the offence is also comparable, the Guernsey courts may well derive considerable assistance from the sentencing practice applied in England because of its larger size and the greater number of cases which will come before the courts of that jurisdiction. A recent example of this court's choosing of its own volition to apply English sentencing levels is the decision in *Burton* itself (which concerned an offence of rape). 18. But there is no need for there to be a significant difference in social or other conditions for the Guernsey courts to take a different approach from England and Wales and adopt a different level of sentencing. The Guernsey courts may simply consider that the sentencing levels in England are either too high or too low and should not be followed. They are perfectly free to do so. It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is that the Guernsey courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England and Wales or in any other jurisdiction." 55. This Court held in *AG v Godson* [2013]

- (2) JLR 1 at para 23 that those observations were equally applicable to Jersey. Observations to like effect can be found in many cases, including the Court of Appeal in *P v AG*

[2012] JCA 070 at paras 14-18 and the five judge Court of Appeal in *Campbell v AG*

[1995] JLR 136 where the Court said at 141: "The Island cannot be impervious to outside influences but there are nevertheless important differences between the sentencing process in Jersey and that which obtains in England.... As we have already stated, Jersey is a separate jurisdiction and entitled to fix its own proper sentencing levels..." 56. In relation to the use of sentencing guidelines issued by the Sentencing Council in England and Wales, we would refer to two dicta, with both of which we respectfully agree. In *AG v Barbosa*

[2013] JRC 165, having referred to the observations in *Campbell* mentioned above, William Bailhache, Deputy Bailiff went on to say this at para 7:- "But of course, we are not impervious to outside influences; nonetheless these considerations go also to a view as to how we should treat the sentencing guidelines as issued by the Sentencing Guidelines Council. It is clear to us that the rationale which lies behind the guidelines which have been issued is a rationale to which we can pay the greatest attention. We agree that there are specific aggravating factors and specific mitigating factors as set out in these guidelines. We agree that there is a distinction between the sort of conduct which amounts to planned attempts to kill and other spontaneous attempts to kill. But we also do not think that it is right to endorse formally the starting points or sentencing ranges which are adopted by the Sentencing Guidelines Council and we therefore have approached the matter in a way which is consistent with our own sentencing policy." 57. In *AG v Sutton*

and McDermott

- [2015] JRC 144 , William Bailhache, Bailiff said this:- "These are reasons why reference to the English sentencing guidelines are generally not regarded as helpful in this Court because the guidelines themselves take into account comparators between different offences committed in the United Kingdom for which sentence is passed in accordance with a different legislative structure. It follows that the sentencing guidelines themselves are not necessarily going to be helpful in Jersey; that is not to say that they are not of interest, of course they are, but they are not necessarily going to be regarded as being in any sense conclusive of the way in which the Royal Court should approach a sentencing issue." 58. Advocate Haines also referred to the decision of the Privy Council in *Milton v The Queen*
- [2015] UK PC 42 where the Privy Council considered sentences imposed in the British Virgin Islands and the guidance that can be derived from the sentencing practices of other countries. The Privy Council said this at para 33:- "The Courts [of the BVI] are entitled to look for guidance to sentencing practices in other countries, but the Board would not recommend that they bind themselves too closely to the regime of the particular country, including the United Kingdom. Local judges are in the best position to assess the appropriate tariff in their jurisdiction, subject to their own statutory provisions." 59. Advocate Haines also referred to a comment from the Scottish case of *Sutherland v Her Majesty's Advocate*
- [2015] HCJAC 115 at [20] where it was stated:- "Definitive Guidelines from the Sentencing Council of England and Wales often provide a useful cross check for sentences in Scotland especially where the offences are regulated, as here, by a UK statute and there are identical sentencing maxima. They should not, however, be applied in Scotland in a rigid or mechanistic fashion, given the differences in sentencing purposes, practices and regimes, between the two jurisdictions. Suffice it to say, in this case, had the appellant been sentenced in England, it would appear that he would have received a much longer custodial term." 60. We respectfully agree with the above passages. The courts of this Bailiwick are free to set their own sentencing levels; they are not bound by the sentencing levels of any other jurisdiction including England and Wales. It follows that they are not bound by any guidelines issued by the Sentencing Council of England and Wales. However, as the cases above also suggest, it is often helpful to look at sentencing practice in another jurisdiction, particularly a larger one where more cases are likely to arise. Having looked at the sentencing levels in an appropriate other jurisdiction, it is then for the courts of this Island to decide whether they find such sentencing levels helpful or not. Applying what the Guernsey Court of Appeal said in *Wicks* , where the elements of the offence in question are comparable in the two jurisdictions and the maximum sentence of the offence is also comparable, the courts of this Bailiwick may well derive considerable assistance from the sentencing practice applied in England because of its larger size and the greater number of cases which will come before the courts of that jurisdiction. 61. In this case, the maximum sentence for indecent assault in Jersey and for rape of a child

under 13 in England and Wales is the same, namely life imprisonment. In our judgment, the sentencing levels envisaged by the Guidelines for the conduct of the defendant in this case are also correct for this jurisdiction. We have no doubt that right-thinking members of the community in Jersey find such conduct abhorrent and would consider that young children are entitled to the protection of the courts, so that persons who commit such offences can expect condign punishment. We cannot think of a single reason as to why it should be thought right for Jersey to impose lower sentences for an offence of this nature than is imposed in England and Wales. It is the view of this Court that a sentence of 8 years (applying the Milberry guideline) would not adequately reflect the gravity of the offending in this case and we think that sentencing levels in England as derived from the Guidelines for the rape by oral penetration of a child under 13 better reflect such gravity. 62. We emphasise that this is not to say that the Court is obliged to follow the Guidelines or that the Guidelines are applicable in this jurisdiction; it is simply to say that in relation to an offence of this specific nature, we find the Guidelines helpful and think that reference to them helps us to formulate the correct sentence for Jersey in this case. We accept that if we are correct, by necessary inference, sentencing levels for rape generally in this jurisdiction may increase to the extent that the Guidelines point to a higher sentence than would be imposed by direct application of the Milberry guidelines. Such a case is not before us but this Court is certainly of the view that rape is a serious offence and that, to the extent the Guidelines suggest a higher level of sentencing than Milberry, we would again think that the sentencing levels envisaged in the Guidelines are reflective of the gravity of rape offences and might be thought to assist in deciding upon the correct sentencing levels in this jurisdiction. 63. Reverting to the particular case before us, we think that most right-thinking members of the community in Jersey would not consider a sentence of 8 years (by application of the Milberry guidelines) as adequately reflecting the gravity of the offences and we agree. It follows that, if it is open to us, we would wish to impose a greater sentence than one of eight years and not to follow exactly the Milberry guidelines. The Attorney General argues that it is open to us to sentence at the level which we would wish, whereas Advocate Haines submits that we must loyally follow the Milberry guidelines (if, contrary to his primary submission, we can have regard to sentencing levels for rape). 64. Advocate Haines submits that we are bound by the decision of the Court of Appeal in *Da Graca* to apply the Milberry guidelines; only the Court of Appeal could change that approach. We do not accept that submission. *Da Graca* was not a guideline case (cf *Rimmer*) where the Court of Appeal specifically laid down guidelines which the Royal Court must follow. The Court of Appeal in *Da Graca* said simply this at paragraph 3:- "The sentencing policy of the Royal Court in cases of rape is based on that adopted by the Court of Appeal in England which is currently set out in the decisions in *R -v- Billam ...* and *R -v- Milberry...*" [Emphasis added] 65. In our judgment, the Court of Appeal was simply observing that in cases of rape, the sentencing policy of the Royal Court was based on that adopted in England. The policy in England happened at that time to be based on Milberry but has since changed and is now based upon the Guidelines. In our judgment, there is nothing in *Da Graca* which prevents this Court from amending its sentencing policy to

reflect changes in the English sentencing policy if that is what this Court wishes to do. Indeed, we would go further. The comment was merely a statement of the sentencing policy of the Royal Court and would not prevent the Royal Court from deciding that it no longer wished to base its rape sentencing policy on that adopted in England. Accordingly, if sentencing practice in England has changed (as it has), it is in our judgment open to this Court to have regard to the new English sentencing policy and follow it (or not) as it wishes. 66. For these reasons, we conclude that it is open to this Court to pass sentence at a level which exceeds that which would be imposed under the Milberry guidelines and which has close regard to the sentencing levels which would result from application of the Guidelines in England and Wales. We emphasise that this is not a case of the Court deciding that it must in some way follow English sentencing practice; it is a case of this Court deciding upon the level of sentence which it thinks appropriate for the Bailiwick and, in doing so, deriving assistance from English practice as currently expressed in the Guidelines. It is an application of the practice described in the last sentence of paragraph 18 of the judgment in Wicks quoted at para 54 above. 67. We would add that even if, contrary to our view, Da Graca is to be treated as a guideline case, it would, in our respectful view, be open to the Superior Number to suggest new guidelines if satisfied that there had been a compelling change of circumstance. In *State of Qatar v Al Thani*

[1999] JLR 118 at 126, the Court considered the doctrine of precedent in this jurisdiction and held that the doctrine of stare decisis as expounded by the English courts was not part of the law of Jersey. However it went on to say:- "A hierarchical structure of courts requires that deference be accorded by lower courts to higher courts. Even in France judges of lower courts will in practice follow the decision of higher courts in most cases. This court is generally bound by the decisions of the Court of Appeal and of course, as it always has been, by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. We qualify the proposition only because, in our judgment, it is open to the Royal Court, as it would be to a Scottish court, to decline to follow a decision which has been invalidated by subsequent legislation or some such compelling change of circumstance." As the Court of Appeal said in *Styles v AG*

[2006] JLR 210 at para 80, the determination of sentences in serious criminal cases rests primarily with the Jurats. They form a wide spectrum of local opinion and, as the Privy Council indicated in the passage from *Milton* cited at para 58 above, are in the best position to assess the appropriate tariff for Jersey. In our judgment, in the rare case where this Court is satisfied that there has been some compelling change of circumstance, it is open to the Court to adjust a guideline laid down by the Court of Appeal if satisfied that this is required; indeed the Attorney General indicated that he considered it was this Court's duty to do so. The difficulty with leaving it to the Court of Appeal would be that it might be some time before a suitable case was brought by an appellant who considered he had been sentenced to too severe a sentence and the alternative of leaving the Attorney General to refer a sentence which he considered unduly lenient to the Court of Appeal would be equally unsatisfactory and uncertain. We emphasise however, that should such

an event occur and should the Court of Appeal subsequently reject this Court's view and reaffirm the original guideline, this Court would thereafter be duty bound to follow the reiterated view of the Court of Appeal. In our judgment, the fact that the sentencing policy in England for offences of rape (upon which the current Jersey sentencing policy is based) has changed is a 'compelling change of circumstance' such as to make it appropriate for this court to depart from the decision of *Da Graca* (if, contrary to our view, that decision is regarded as laying down a guideline). 68. Advocate Haines submitted that it would be inappropriate and potentially confusing to have regard to the Guidelines for one particular offence (rape of a child under 13) but not to have regard to the Guidelines concerning other sexual offences. We do not agree. The Court must decide on the appropriate sentence for the offences before us and, for the reasons given, we consider that the Guidelines help us to arrive at the correct level of sentence for those offences in this jurisdiction. It would be for consideration in future when the point arises as to whether the guidelines will also be of assistance in other sexual offences. We have not been referred to other aspects of the Guidelines and do not know whether sentencing levels for other offences of indecent assault on a child or procuring acts of gross indecency by a child would result in a higher sentence under the Guidelines than is currently the case in this jurisdiction. If that were to be so, we can well understand an argument that there would be no good reason for sentencing levels in Jersey not to be increased correspondingly but that would be a matter for the Court hearing the particular case where the point arises. 69. Advocate Haines further submitted that it was not open to this Court to change sentencing policy in respect of an offence committed before announcement of that change. Again, we cannot accept that argument. It is of note that the Guidelines are expressed to apply to any sentence imposed after 1 st April, 2014, regardless of when the offence in question was committed. We would refer also to the leading decision of the English Court of Appeal in *R v H and others*

[2012] 1 WLR 1416 , which considered sentencing practice in respect of historic offences and held that, whilst the sentence imposed could not exceed the maximum sentence which could be imposed by law at the time of the offence, the defendant must otherwise be sentenced in accordance with the sentencing regime applicable at the date of sentence. Application to the facts 70. Before turning to the sentence imposed, it is necessary to consider the topic of consecutive and concurrent sentences, given the fact that the defendant is to be sentenced for two offences committed some time apart. 71. The Attorney General submits we should impose consecutive sentences, with each individual sentence being less than would have been passed for a single offence because of the need to have regard to the totality principle. Thus, even though he moved for a total of 12 years' imprisonment, he submitted that this should be achieved by imposing consecutive sentences of 5 years on Count 1 and 7 years on Count 5. He referred to the guidelines issued by the Sentencing Council on totality which indicated that, although concurrent sentences would ordinarily be appropriate where there was a series of offences of the same kind committed against the same person, consecutive sentences could be passed where the overall criminality

would not sufficiently be reflected by concurrent sentences. He submitted that that would be the position here. 72. Whatever may be the position in England and Wales, we think that the approach to concurrent and consecutive sentences in Jersey is clear and should be followed. In *AG v Myles and Vale*

- [2005] JRC 026 , the Royal Court said this at para 7:- "7. In cases of multiple offences, the key role for this Court is to decide on the appropriate aggregate sentence having regard to the totality of the offending. This can be done in one of two ways. Sometimes the Court can pass a number of consecutive sentences. In that case the individual sentences for particular offences are likely to be less than if that individual offence had stood alone, as otherwise the aggregate sentence would become too high. Alternatively the Court can pass concurrent sentences, but in that case the Court is likely to have to lift the sentence for the most serious offence beyond what would have been passed if the offence had stood alone. Otherwise the aggregate sentence for a substantial number of offences would be no greater than would have been passed if the most serious offence had stood alone. In other words there would be no punishment for the fact that more than one offence has been committed. Alternatively, the Court will sometimes have to pass some concurrent and some consecutive sentences. In all of these cases the individual sentences have to be tailored to reflect the overall level of offending." This statement of the Royal Court was specifically endorsed in its entirety by the Court of Appeal on appeal in that case; see *Myles v AG*
- [2005] JCA 065 at para 39. 73. This Court regularly adopts the second of the two approaches indicated there, i.e. increasing a concurrent sentence beyond that which would have been passed if the offence had stood alone (an example is what is known as the Valler uplift, following the decision of the Court of Appeal in *Valler v AG*
- [2002] JLR 383 . In that case the appellant imported a quantity of heroin and a quantity of ecstasy. If the heroin had stood alone, the starting point would have been 14 years and if the ecstasy had stood alone, the starting point would have been 13 years. The Court of Appeal upheld the approach of the Royal Court to increase the starting point to 16 years on the more serious offence and then impose concurrent sentences. In doing so, the Court of Appeal adopted the approach of a five judge Court of Appeal in *Richards v Law Officers*
- [2002] GLR 5 at para 12. To the extent that there is any difference between the approach to concurrent and consecutive sentences in Jersey and that described in the English guidelines, we prefer the approach in Jersey. 74. The consequence of imposing consecutive sentences in the current case would mean that the sentence for each individual offence would not reflect the gravity of that offence and in our judgment that would be undesirable. We propose therefore to impose concurrent sentences but to increase the sentence on the second offence to reflect the fact that the defendant committed two offences rather than just one. 75. These are extremely serious offences. They involved blindfolding the young victim, placing her in the humiliating and helpless position of being on her knees with her hands tied behind her and secured to the sink and

then forcibly assaulting her by penetrating her mouth with his penis, thrusting backwards and forwards to the point of ejaculation. 76. We note that all parties agreed that, if this case were being heard in England, it would fall within category 2A of the Guidelines for an offence of rape of a child under 13 because of the presence of an especially serious effect on the victim (by way of harm) and a breach of trust (by way of culpability). The starting point would therefore have been 13 years. 77. Additional aggravating factors as listed at para 45 above include the further degradation of the victim and the location and timing of the offence, which would go to increase the starting point further. As to mitigation (apart from a guilty plea), we do not think there is anything significant. It is true that the defendant has no previous convictions for sexual offences but he does have convictions for violence against this child. Advocate Haines submitted that he was remorseful but we consider that the degree of his remorse is somewhat limited bearing in mind the contents of para 40 of the probation report and the observation at para 51 of that report that the defendant has limited recognition of how his behaviour has affected others, particularly the victim. He appears to believe that the victim simply wanted to make things difficult for him. 78. Taking account in addition of the need to reflect the fact that there are two offences, this Court considers that a starting point of 15 years for Count 5 (on the basis that it was his second offence) is appropriate with a 14 year starting point for Count 1. In reaching this figure, whilst we have had regard to the Guidelines, we have stood back and asked ourselves whether, for these offences in this jurisdiction that is an appropriate starting point. We have reached the clear conclusion that it is. We think that the aggregate starting point of 18 years suggested by counsel instructed by the Attorney General is too high for these two offences and the 13½ years taken by counsel instructed on behalf of the defendant is too low, particularly having regard to the fact that there was more than one offence and the existence of the other aggravating factors referred to. 79. The Attorney General concedes that a full discount of 1/3 for the guilty plea would be appropriate and we agree. It follows that we reach the conclusion that the correct sentence for these two offences is 9 years' and 4 months on Count 1 and 10 years on Count 2, such sentences to be served concurrently. We repeat that the Court is not imposing this level of sentence because that would be the level imposed in England and Wales. We are imposing this sentence because, informed by the practice in England and Wales, we think that it is the correct level of sentence for Jersey. 80. The conviction means that the defendant is automatically subject to the notification requirements contained in Article 6 of the Sex Offenders (Jersey) Law 2010 ("the Law"). Article 5(1) requires the Court to specify a period that must expire before the offender may apply to no longer be subject to the notification requirements. The Attorney General moves for a period of 15 years having regard to the gravity of the offending. 81. Advocate Haines submitted that this was not the correct test. Article 5(4) states that the period must take into account the risk of sexual harm to the public or to any particular person or persons that the offender poses by virtue of the likelihood of re-offending. In relation to the risk of re-conviction for sexual offences and risk towards children, paragraph 51 of the probation report stated that the defendant was at moderate risk of similar re-conviction. In those circumstances, given in addition the

nature of the offence and the period of imprisonment imposed, the Court agrees with the Attorney General that a period of 15 years is appropriate. 82. As to restraining orders under Article 10 of the Law, the Attorney General asks the Court to make an order in the following terms:- (i) That the defendant is prohibited from being alone with any female he knows or believes to be under the age of 16. (a) He shall be considered to be alone if there is not present an adult over the age of 21 who is aware of his offending history. (b) The adult over the age of 21 who is aware of his convictions must be in the same room; it shall not be sufficient for the adult to be merely in the same dwelling. (ii) That in circumstances where the defendant finds himself alone with any female under the age of 16, accidentally or inadvertently, he has a positive duty to remove himself from that situation as soon as reasonably possible. (iii) The defendant is prohibited from having any contact, direct or indirect with the victim. (iv) The above restrictions shall not apply to the defendant's three children [named], contact with whom shall be subject to any restrictions put in place by the Court, Children's Service or any other competent agency. 83. For reasons already mentioned, the Court is satisfied that the defendant poses a threat of serious sexual harm to the public or any particular person or persons and it is necessary to make such an order for protecting young girls from the defendant. It therefore agrees that an order in these terms should be made and it considers that a period of 15 years would be appropriate for the orders to last. 84. Finally we turn to the question of deportation as the defendant is a Venezuelan national. The test is well established and was set out in *Camacho v AG*

[2007] JLR 462 . The Court must ask itself two questions:- (i) Is the defendant's continued presence detrimental to the Island? (ii) If yes, would the deportation be disproportionate having regard to the relevant ECHR rights of the defendant and others not before the Court, in particular the right of the defendant and his family to respect for family life under Article 8. The second limb involves a balancing exercise where the interests of the community in deporting the offender have to be weighed against the interests of others not before the Court. 85. We have no hesitation in concluding unanimously that the first limb of the test is met. These were appalling offences and the Court has found that the defendant is at risk of future offending. His continued presence in the Bailiwick is undoubtedly detrimental. 86. It is the second limb which has caused the Court more difficulty. The defendant has resided in the Island for some 18 years, having come to the Island when he was 18. He was born in Venezuela and lived there until the age of 10, at which stage his family moved to Madeira. He remained there until he came to Jersey. His mother still lives in Madeira and one brother lives in England but otherwise his siblings, comprising two brothers and one sister, now live in Jersey. He has been married since 2004 and the couple have three children aged 7, 5 and 1. His wife (the victim's mother) said in her statement to the Court in support of the defendant that she would support and stand by the defendant now and in the future for the children and that she wishes for the defendant to have contact with the children. She will continue to support and arrange that contact during his prison sentence. However, she has also said that she has decided that the marriage is over although she goes on to say that for her it has been a perfect marriage

and that the defendant is a family man who has an excellent relationship with his three children. Sadly, her lengthy statement is completely silent about the victim. She asks that the Court allow the defendant to stay in Jersey. 87. As already mentioned, the issue of deportation requires the Court to conduct a balancing exercise. Two of the Jurats are of the opinion that the interests of the three children and the mother are insufficiently strong to prevail against the interests of the community given the circumstances and nature of the defendant's offending. They are of the opinion that deportation would not be disproportionate. However, the remaining four Jurats are of the opinion that, on balance, the effect on the three children, the length of time that the defendant has resided in Jersey, his wider family connections here and the lack of connections with Madeira or Venezuela means that deportation would be disproportionate and would accordingly amount to a breach of Article 8 of the ECHR. 88. By a majority therefore, the decision of the Court was not to recommend deportation. Authorities AG-v-K

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